STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 290832 Oakland Circuit Court
JAMES GREGORY DENT, Defendant-Appellant.	LC No. 2007-216132-FH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for possession with intent to deliver 50 grams or more, but less that 450 grams of a controlled substance (cocaine), MCL 333.7401(2)(a)(iii); possession of less than 25 grams of a controlled substance (heroin), MCL 333.7403(2)(a)(v); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the evidence that was seized during the execution of the search warrant because the affidavit supporting the warrant failed to establish probable cause. We review the trial court's ultimate decision regarding a motion to suppress and questions of law involved in that determination de novo. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). The trial court's findings of fact are reviewed for clear error. *Id.*

The magistrate's determination that the affidavit set out sufficient probable cause to issue a search warrant is given great deference. *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007). This Court "ask[s] only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Unger*, 278 Mich App 210, 243-244; 749 NW2d 272 (2008), quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). The magistrate, in determining whether to issue a warrant,

> is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. [*Keller*, 479 Mich at 475, quoting *Illinois v Gates*, 462 US 213, 238-239; 103 S Ct 2317; 76 L Ed 2d 527 (1983).]

"Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *People v Champion*, 452 Mich 92, 111 n 11; 549 NW2d 849 (1996), citing *Gates,* 462 US at 243-244 n 13. "[T]he threshold inquiry looks at the life cycle of the evidence sought, given a totality of circumstances, that includes the criminal, the thing seized, the place to be searched, and, most significantly, the character of the criminal activities under investigation." *People v McGhee*, 255 Mich App 623, 635; 662 NW2d 777 (2003), quoting *Russo,* 439 Mich at 603. "The affiant's experience is relevant to the establishment of probable cause. Police officers are presumptively reliable . . . ." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001), citing *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997).

In order to accommodate the Fourth Amendment's strong preference for searches undertaken by warrant, both our Supreme Court and the United States Supreme Court have cautioned that (1) "'courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than commonsense, manner[,]'" and (2) that a "grudging or negative attitude by reviewing courts towards warrants' is inconsistent with the Fourth Amendment . . . ." *Russo,* 439 Mich at 603-604, quoting *Gates*, 462 US at 236-237.

In the affidavit attached to the search warrant, the officer established his experience and training in narcotics enforcement and the reliability of the confidential informant. The officer also averred that he had probable cause to believe that the premises of 240 South Anderson contained evidence of criminal conduct, i.e., controlled substances including heroin and other drug-related paraphernalia, based upon the following:

* * *

> (2) That Affiant has been conducting a continued investigation concerning illegal drug trafficking at 240 South Anderson . . . . Confidential [sic] informant of established reliability provided the affiant with true and accurate information concerning criminal activity at 240 South Anderson.
>
> (3) The affiant has controlled the purchase of heroin from the location once within the past 48 hours. The controlled purchase was performed with the cooperation of a confidential informant.
>
> (A) The confidential informant contacted a black male and arranged to purchase narcotics. Within five minutes after the phone call Ofc. Main observed a black male exit 240 South Anderson, enter a 1997 Chevrolet Monte Carlo . . . and drive to the pre-arranged meet location. Once at the pre-arranged meet location affiant observed the black male conduct a hand-to-hand narcotics transaction with the confidential informant.
>
> (B) The substance alleged by the informant to be heroin was field-tested by affiant using the Mecke's Modified Reagent Tester and a positive reaction was received for the presence of heroin.
>
> (C) The informant was searched immediately before and after making the purchase with negative results.

(D) The affiant observed the confidential informant perform the hand-to-hand transaction and return to the pre-arranged meet location without stopping at any other location or having contact with any other persons.

(E) After the purchase had been made affiant identified the individual that sold the heroin to the confidential informant as Howell James McCullum (DOB 03/18/52).

* * *

(5) Affiant conducted a Computerized Criminal History search of Howell James McCullum (DOB 03/18/52). [He] was convicted of felony controlled substance-possession (narc/cocaine) less than 25 grams CFN:. [sic]

We conclude that the trial court did not err in finding that the affidavit provided probable cause to support the issuance of the search warrant. As detailed above, a highly trained and qualified narcotics officer stated in the affidavit that he arranged for a drug buy through a reliable confidential informant who had already provided the officer with "true and accurate information concerning criminal activity" at the premises. The seller was then contacted, he immediately left the premises at issue, and went directly to the pre-arranged location and engaged in the sale with the confidential informant. Tests proved the substance involved in the sale was illegal narcotics, and subsequent information (provided in the affidavit) revealed that the seller had a prior conviction for the sale of narcotics. Thus, what was presented to the magistrate was that a convicted drug dealer was in the house (a house where "criminal activity" was reported by a reliable informant), that he left the house without stopping to pick up drugs, and sold the drugs to the informant. Given this information, and affording the appropriate "great deference" entitled to the magistrate's decision, we conclude that sufficient probable cause existed to issue the warrant.

The fact that nothing tied the seller to the house, other than his being present in it immediately before engaging in the transaction, is of no moment. The Supreme Court has repeatedly held that in determining the sufficiency of the affidavit the focus is "not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific 'things' to be searched for and seized are located on the property . . . ." *Zurcher v Stanford Daily*, 436 US 547, 556; 98 S Ct 1970; 56 L Ed 2d 525 (1978). See, also, *United States v Pinson*, 321 F3d 558, 564 (CA 6, 2003). Hence, the fact that someone who had just been in the house had sold drugs to the informant, and had been previously convicted of selling drugs, was enough to reasonably believe that drugs and associated paraphernalia could be located in the premises.

Although defendant likens this case to *People v David*, 119 Mich App 289, 293-296; 326 NW2d 485 (1982), we find that case distinguishable. In that case, the affidavit supporting the search warrant contained only hearsay statements from an informant and no information about the reliability or credibility of the informant. *Id.* at 293-294. In contrast, in the present case the informant's credibility and reliability were set forth extensively in the affidavit, including the fact that the informant had never provided false information in the past and had been confirmed by other sources, and the informant had participated in over 40 controlled buys and 15 search warrants had been obtained as a result. The informant was searched before and after the

controlled buy. The police observed the drug source leave defendant's residence shortly after the informant called to arrange the controlled purchase and travel directly to the pre-arranged location for the transaction. The police observed the "hand to hand" drug transaction between the informant and the drug source. The affiant indicated that the residence had been under continued surveillance, and the affiant set forth his lengthy experience in narcotics trafficking investigation. Thus, the information provided "some indication of the reliability of the buyer-informant so that a conclusion that a purchase actually took place may be legitimately drawn." *Id.* at 295. As noted, we give great deference to the magistrate's determination regarding probable cause. *Keller*, 479 Mich at 474.[1]

Additionally, in *People v Williams*, 139 Mich App 104, 107; 360 NW2d 585 (1984), overruled in part on other grounds in *Russo*, 439 Mich at 584, this Court distinguished *David*, 119 Mich App at 295, because the information was stale where the single controlled buy occurred three days before police attempted to obtain a warrant. In *Williams*, the affiant used a confidential informant he had used on seven prior occasions to arrange a controlled purchase of narcotics from a particular location; the affiant searched the informant before and after the transaction; the affiant provided the informant with funds for the purchase and observed the informant enter the location and exit a short time later; and the informant then handed the affiant the heroin he purchased inside the location. *Id.* at 105-106. Thus, "the police officer-affiant's information regarding the single controlled buy formed a sufficiently substantial basis for the magistrate's finding of probable cause to search" the designated location for heroin because there was probable cause to believe that heroin was located in the house and the information was not stale when the controlled buy occurred one day before the request for the warrant. *Id.* at 107-108.[2]

We also hold that, considering the totality of the circumstances, the affidavit was not stale because the controlled purchase occurred within 48 hours of the warrant request; there was an indication of continued drug activity and the residence had been under continued surveillance for such activity; the drug source left the residence shortly after the informant's call and traveled to the pre-arranged location for the hand-to-hand drug transaction; the drug source had been

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[1] We agree with the prosecution that this case is analogous to *Keller*. In *Keller*, 479 Mich at 476, the Michigan Supreme Court held that the presence of marijuana and correspondence in the trash that was uncovered by police in a trash pull provided a substantial basis to find probable cause to search the defendants' home for contraband, regardless of the veracity of an anonymous tip about illegal activity, because the trash pull provided direct evidence of illegal activity inside the home and the correspondence linked the trash to the defendants. *Id.* at 477. The present circumstances are similar in that the police observed McCullum exit 240 South Anderson almost immediately after the informant's call, observed McCullum travel to the pre-arranged location, and observed him sell narcotics to the informant, which supports that there were narcotics inside the residence from which McCullum had emerged shortly before.

[2] *People v McCullum*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket No. 284634), directly on point and is consistent with our conclusion. Although unpublished opinions of this Court are not binding precedent, they may be considered instructive or persuasive. MCR 7.215(C)(1); *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 380; 738 NW2d 289 (2007), lv den 480 Mich 1032 (2008).

convicted of a prior drug-related offense; and the informant had proven reliable on numerous prior occasions. *People v Brown*, 279 Mich App 116, 128; 755 NW2d 664 (2008).

The differences between our opinion and that of the dissent are vast. In our view, the dissent engages in a de novo review critically picking apart what it finds as deficiencies in the search warrant affidavit. Such a hypertechnical review, however, the law does not allow. See *Russo*, 439 Mich at 604 (courts are not to employ hypertechnical review of affidavits, but should apply commonsense). Additionally, the dissent criticizes the affidavit because it "did not identify the homeowner or substantiate that someone who lived in the home possessed a criminal record or a history of drug dealing." However, as we have already noted, the focus of a search warrant is not on the people who may or may not reside in the residence; instead, the focus is on the specific things to be searched or seized that are located on the property. *Zurcher*, 436 US at 556. Additionally, there does not need to be direct evidence connecting drug trafficking or transactions to the house being searched, *United States v Feliz*, 182 F3d 82, 88 (CA 1, 1999); *United States v Sleet*, 54 F3d 303, 306 (CA 7, 1995), and our Court as well as the federal courts have held that a police officer or magistrate is entitled to infer that someone engaged in illicit drug activity would keep items evidencing such illegal activity in the house. *People v Nunez*, 242 Mich App 610, 614-615; 619 NW2d 550 (2000); *Feliz*, 182 F3d at 88; *United States v McClellan*, 165 F3d 535, 546 (CA 7, 1999); *United States v Brito*, 677 F Supp 2d 339, 342-344 (D Mass, 2009). In this case, the issuing court could reasonably infer that 240 Anderson contained evidence of illegal narcotics since (1) the house being searched was where a convicted drug felon was located immediately prior to engaging in an undercover drug transaction, and (2) according to the reliable informant, the home had been the location of "criminal activity."

Finally, we note that the dissent indicates that "it is at least equally plausible" that the individual engaging in the narcotics sale obtained the stash of heroin on his person or inside the vehicle that he drove to the sale. That much is true. However, if it is "equally plausible" that the officer's version of the facts could be true, the warrant can be issued. See *State v Forker*, 214 Or App 627, 628-629; 168 P3d 279 (2007); *People v Altman*, 960 P2d 1164, 1171-1172 (Colo, 1998).

Defendant next argues that the trial court erred in failing to instruct the jury on the difference between expert and factual witness testimony. Defendant waived his objection to the instructions on appeal because he affirmatively approved them as given at trial and did not request such an instruction. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Any error is therefore extinguished.

In any event, even if this issue were not waived, we would find no plain error requiring reversal. The trial court instructed the jury that, in assessing Officer Daniel Main's expert testimony in the area of narcotics trafficking, it did not have to believe his testimony, and that it should assess its importance, the reasons he gave for his opinions, his qualifications, and whether his opinions made sense in light of all of the other evidence. The trial court also instructed the jury that police officers' testimony should be judged according to the same standards used to evaluate the testimony of any other witness. In addition, when defense counsel objected to a particular opinion expressed by Main, the trial court cautioned the jury that a witness who was qualified as an expert was permitted to give his opinion, but the jury did not have to accept the opinion, and it could reject the opinion in whole or in part. Unlike in *United States v Lopez-Medina*, 461 F3d 724, 743-744 (CA 6, 2006), the trial court here twice provided a general

cautionary instruction regarding how to weigh expert testimony, which the *Lopez-Medina* Court indicated would have been sufficient to avoid reversal. See, also, *United States v Vasquez*, 560 F3d 461, 470 (CA 6, 2009). The trial court also issued an instruction regarding assessing police officers' testimony in general. Additionally, no evidentiary errors occurred, unlike in *Lopez-Medina.* Thus, there was no plain, outcome determinative error in this case.

Defendant next argues that there was insufficient evidence to support his conviction for felony-firearm. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Werner,* 254 Mich App 528, 530; 659 NW2d 688 (2002). All reasonable inferences and credibility choices are made in support of the jury's verdict. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felony-firearm are that the defendant possessed a firearm during the commission of or attempt to commit a felony. *People v Avant,* 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a firearm may be actual or constructive, joint or exclusive, and it may be proven using circumstantial evidence. *People v Burgenmeyer,* 461 Mich 431, 437-438; 606 NW2d 645 (2000); *People v Hill,* 433 Mich 464, 469-470; 446 NW2d 140 (1989). A defendant constructively possesses a firearm if he knows the location of the firearm and it is reasonably accessible to him. *Burgenmeyer,* 461 Mich at 438. Possession is determined at the time of the offense, not at the time of the arrest or search. *Id.* at 439.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find, beyond a reasonable doubt, that defendant had constructive possession of the firearms in the residence and was therefore guilty of felony-firearm. *Werner,* 254 Mich App at 530. Defendant admitted he was aware of the firearms' locations in the house. Additionally, the evidence supports an inference that the firearms were readily accessible. The door to defendant's mother's bedroom was open and her closet did not have a door; the firearms were behind some clothes, but not otherwise locked up. The third bedroom was unoccupied and the gun was found in the closet. Defendant and his mother admitted that he stayed at her house, and there were documents bearing his name, clothing in his size, and drug-related items located in the east bedroom, which was just down the hall from the two bedrooms containing the weapons. Defendant stated that he knew the police would come to the house. There was evidence presented that the presence of firearms was common in drug trafficking operations, and a press, grinder, drugs, and packaging materials were found in the vehicles parked in front of the house, and defendant was linked to those vehicles. Importantly, defendant volunteered to police during the search that there were firearms in the closet that belonged to his father, and he knew he was not allowed to "be around those guns" because he was a convicted felon. Hence, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant possessed the firearms.

In defendant's final claim of error, he alleges that the trial court erroneously scored 35 points for prior record variable (PRV) 2, MCL 777.52. Defendant properly preserved this issue for appeal by his objection at sentencing. MCL 769.34(10); *People v Kimble,* 470 Mich 305, 310-311; 684 NW2d 669 (2004). The proper construction of the sentencing guidelines, and the legal questions involved in their applicability, present issues of law reviewed de novo. *People v Underwood,* 278 Mich App 334, 337; 750 NW2d 612 (2008). The sentencing guidelines are interpreted according to the rules of statutory construction. *People v Lyons (After Remand),* 222

Mich App 319, 322; 564 NW2d 114 (1997). We enforce the plain, unambiguous language of the statute. *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002).

PRV 2 provides:

> (1) Prior record variable 2 is prior low severity felony convictions. Score prior record variable 2 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender has 4 or more prior low severity felony convictions — 30 points
>
> (b) The offender has 3 prior low severity felony convictions — 20 points
>
> (c) The offender has 2 prior low severity felony convictions — 10 points
>
> (d) The offender has 1 prior low severity felony conviction — 5 points
>
> (e) The offender has no prior low severity felony convictions — 0 points
>
> (2) As used in this section, "prior low severity felony conviction" means a conviction for any of the following, if the conviction was entered before the sentencing offense was committed:
>
> (a) A crime listed in offense class E, F, G, or H.
>
> (b) A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.
>
> (c) A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years.
>
> (d) A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of less than 10 years. [MCL 777.52.][3]

The trial court scored PRV 2 at 35 points. This was error where a maximum score under MCL 777.52 is 30 points. However, the trial court properly scored four prior low severity felonies. Defendant's presentence investigation report reflects prior convictions for felonious

[3] On January, 9, 2007, MCL 777.52 was amended by 2006 PA 655, immediately effective, to rewrite subsection (2), which previously read: "As used in this section, 'prior low severity felony conviction' means a conviction for a crime listed in offense class E, F, G, or H or for a felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H, if the conviction was entered before the sentencing offense was committed."

assault, felon in possession of a firearm, two felony-firearm convictions, and possession with intent to deliver 50 to 449 grams of a controlled substance. Felonious assault, MCL 750.82, is a class F offense. MCL 777.16d. Felon in possession of a firearm, MCL 750.224f, is a class E offense. MCL 777.16m. These two offenses therefore qualify as prior low severity felony convictions that may be counted in PRV 2. MCL 777.52(2)(a). The two felony-firearm convictions, contrary to defendant's claims, also constitute prior low severity convictions under the amended language of MCL 777.52(2)(c).[4]

Moreover, although defendant argues that felony-firearm should not be counted because it carries a determinate sentence, this assertion is inconsistent with the purpose of PRV 2, which is to provide for longer sentences where a defendant has a prior criminal history. *People v Maben*, 208 Mich App 652, 655; 528 NW2d 850 (1995). Further, in PRV 7, MCL 777.57, the language of the statute specifically excludes consideration of felony-firearm in scoring subsequent and concurrent felony convictions. MCL 777.57(2)(b) provides: "[d]o not score a felony firearm conviction in this variable." This language is noticeably absent from PRV 2. Where a provision is omitted in one part of a statute and is included in another part, we construe the omission as intentional. *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006). We also read the two statutes together because they are both part of the Legislature's sentencing guidelines. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007).

Defendant should have been scored 30 points for PRV 2. MCL 777.52(1)(a). This results in a total PRV score of 75, level F. MCL 777.63. With correction of the score, defendant's total offense variable score is 55 points, level V; the legislative sentencing guidelines' recommended minimum range remains the same at 99 to 240 months' imprisonment, with the habitual offender enhancement, and therefore resentencing is not required. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[4] Defendant's reliance on *People v Martin*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2006 (Docket No. 259716), is misplaced where that case was decided before the amendment, when a prior low severity offense was limited to crimes specifically listed in offense classes E, F, G, or H. The amended language, however, now specifically incorporates felonies that are not listed in the offense classes. MCL 777.52(2)(c). Felony-firearm is not a class M2, A, B, C, D, E, F, or H offense. MCL 777.52(2)(c); MCL 777.16m. MCL 777.52(2)(c) also requires that the conviction's maximum punishment be less than ten years. MCL 750.227b(1) provides that first and second felony-firearm convictions carry sentences of two and five years, respectively.